Supreme Court, U.S.
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No. 06-477

IN THE

Supreme Court of the United States

SERGIO BANDA-ORTIZ,

Petitioner,

v.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY FOR PETITIONER

DAVID J. SCHENCK
DAVID L. HORAN
JONES DAY
2727 North Harwood Street
Dallas, TX 75201
(214) 220-3939

MICHAEL A. CARVIN
(*Counsel of Record*)
LAWRENCE D. ROSENBERG
VICTORIA DORFMAN
DONALD E. CHILDRESS III
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Petitioner

On September 28, 2006, Sergio Banda-Ortiz filed a petition for a writ of certiorari to resolve the question of whether a motion to reopen proceedings before the Board of Immigration Appeals ("BIA") automatically tolls the running of a previously-established voluntary-departure period. Banda-Ortiz showed that the Courts of Appeals are split on this question, Pet. 7-11, explained that the question presented is important, recurring, and impacts a substantial number of aliens, *id.* at 11-18, and illustrated why the Fifth Circuit's no-tolling position is inconsistent with the statutory scheme, *id.* at 18-28.

On November 22, 2006, after the petition for certiorari was filed, Banda-Ortiz and the Department of Homeland Security jointly filed a motion with the BIA to reopen Banda-Ortiz's removal proceedings. Resp. 9; Resp. App. 10a. The motion was prompted by the discovery that Banda-Ortiz failed to post a $1500 voluntary departure bond, as required by his voluntary departure order, and by a new BIA decision, issued on November 15, 2006, in *Matter of Diaz-Ruacho*, 24 I. & N. Dec. 47 (B.I.A. 2006). Resp. 9-10, Resp. App. 10a. In that case, the Board held that an alien who fails to post the voluntary departure bond required by 8 U.S.C. § 1229c(b)(3) is not subject to the penalties in 8 U.S.C. § 1229c(d) for failure to depart within the time period specified for voluntary departure. Under the reasoning of that decision, Banda-Ortiz must be viewed as having never been permitted to voluntarily depart where he failed to post the required bond. By extension, his motion to reopen should not have been denied under § 1229c(d) based on a failure to voluntarily depart.

On December 19, 2006, the BIA granted the joint motion to reopen; vacated its own and the Immigration Judge's decisions, that were reviewed by the Fifth Circuit, and remanded "the record for further consideration of [Banda-Ortiz's] application for cancellation of removal." Resp. App. 10a.

On February 23, 2007, the Government filed its Brief for Respondent in this Court, setting forth those developments and explaining that this case is now moot because the "administrative orders that were reviewed by the court of appeals below and that are the subject of the petition for a writ of certiorari are now vacated and are no longer in effect." Resp. 10. In the Government's view "[w]hen a case that would otherwise warrant certiorari becomes moot through happenstance or for similar reasons, the appropriate course, in our view, ordinarily is to grant the petition, vacate the court of appeals' judgment, and remand the case with instructions to dismiss." *Id.* (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Alternatively, the Government suggests that the petition should be denied. *Id.*

We agree that the petition should be denied given that this case is now moot since Banda-Ortiz obtained the relief—grant of a motion to reopen—he sought through the petition. The Government also contends, however, that the "happenstance" of the BIA decision in *Diaz-Ruacho* makes it appropriate to grant, vacate, and remand this case with instructions to dismiss under *Munsingwear*. Resp. 10. While there is some force to this argument, it is not entirely clear that this case falls within the *Munsingwear* paradigm. In this case, and unlike *Munsingwear*, the losing party, here petitioner, did play a part in mooting out the case by joining in the motion to reopen removal proceedings before the BIA, Resp. App. 10a. *See United States Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22-25 (1994) (illustrating that GVR may be inappropriate as a matter of equity in such a case). Since there are no continuing effects of the decision below for petitioner, we take no position on the Government's suggestion for vacating.

Respectfully submitted,

DAVID J. SCHENCK
DAVID L. HORAN
JONES DAY
2727 North Harwood Street
Dallas, TX 75201
(214) 220-3939

MICHAEL A. CARVIN
(Counsel of Record)
LAWRENCE D. ROSENBERG
VICTORIA DORFMAN
DONALD E. CHILDRESS III
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939
Counsel for Petitioner

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